

VZCZCXRO6646
PP RUEHCN RUEHGH RUEHVC
DE RUEHBJ #1014/01 1070242
ZNR UUUUU ZZH
P 170242Z APR 09 ZDK
FM AMEMBASSY BEIJING
TO RUEHC/SECSTATE WASHDC PRIORITY 3478
INFO RUEHOO/CHINA POSTS COLLECTIVE
RUEHIN/AIT TAIPEI 7219
RUEHKO/AMEMBASSY TOKYO 2508
RUEHUL/AMEMBASSY SEOUL 1161
RUEHMO/AMEMBASSY MOSCOW 9286
RUEHGV/USMISSION GENEVA 2421
RUEAHL/DHS WASHDC
RUCPDO/USDOC WASHDC
RUEAWJA/DEPT OF JUSTICE WASHDC
RHMCSUU/FBI WASHINGTON DC

UNCLAS SECTION 01 OF 04 BEIJING 001014

SENSITIVE
SIPDIS

State for EAP/CM - PPark and EB/IPE - DBubman
State for EB/TPP - EMagdanz and INL - JVigil
State for EB/CIP - WWittman and RDaley
USTR for China Office - AWinter; IPR Office -
Kalvarez, JRagland, and SMcCoy
Commerce for National Coordinator for IPR
Enforcement
Commerce for MAC ESzymanski
Commerce for MAC SWilson, JYoung
LOC/Copyright Office - STEpp
USPTO for Int'l Affairs - LBoland, EWu, STong
DOJ for CCIPS - MDubose and SChembtob
FTC for Blumenthal
FBI for LBryant
DHS/ICE for IPR Center - DFaulconer, TRandazzo
DHS/CBP for IPR Rights Branch - GMacray, PPizzeck
ITC for LLevine, LSchlitt
State for White House OTP Ambassador Richard Russell

E.O. 12958: N/A
TAGS: [ETRD](#) [EIND](#) [KIPR](#) [ECON](#) [CH](#)

SUBJECT: CHINA/IPR: ECONOMIC DOWNTURN WEAKENING IPR
ENFORCEMENT

BEIJING 00001014 001.3 OF 004

This cable is sensitive but unclassified and is not
for Internet distribution.

Ref A: Beijing 4527
Ref B: Beijing 3732
Ref C: Guangzhou 0043

Summary

1. (SBU) China is facing increased difficulty in enforcing intellectual property rights (IPR) and preventing "local protectionism" during the economic downturn, Chinese government officials at the Supreme People's Court (SPC) and Ministry of Commerce acknowledged to a recent U.S. government delegation. A top IPR judge outlined her view that preserving local businesses and jobs is a higher priority than ceasing infringement. U.S. businesses confirm a trend toward weaker enforcement, describing reluctance by Chinese authorities to pursue criminal IP cases and citing recent examples of especially low administrative penalties for counterfeiters. Chinese officials continue to avow commitment to protecting IPR, but like the rest of the Chinese government, minimizing the negative impact of the downturn may be their most important

goal. End Summary.

SPC Judge Invokes Public Interest

¶2. (SBU) In December 2008, Chinese media reported that the chief intellectual property (IP) judge of the country's Supreme People's Court had suggested a public interest test to determine whether those infringing the rights of others should be ordered to stop (Ref A). Newspaper reports said Judge Kong Xiangjun proposed that, in cases where the public interest was not violated, an infringer should be ordered to pay damages to the right holder rather than cease the illegal activity. In order to mitigate the effects of the downturn in China, the senior IP judge appeared to support selective or deferred law enforcement to protect jobs and avoid the collapse of local businesses, especially China's vulnerable small and medium-sized enterprises. At the time, the SPC would not confirm the accuracy of Judge Kong's quoted remarks.

It's Not Business Protection...

¶3. (SBU) In an April 2 meeting with visiting USG officials, Econoff asked SPC Presiding IP Judge Yu Xiaobai and IP Judge Ma Xiurong to clarify Judge Kong's December statement. (Note: Judge Kong himself, originally scheduled to host the meeting, cancelled at the last minute due to a "leg injury." End Note). Judge Yu said it would be a misinterpretation of Judge Kong's remarks to think

BEIJING 00001014 002.2 OF 004

that the SPC would avoid ordering an injunction to save a domestic enterprise from collapse. She noted that SPC President Judge Wang Shenjun has repeatedly called for those who violate laws to bear responsibility for their actions, even during the global financial crisis.

...It's Just Business Preservation

¶4. (SBU) However, Judge Yu continued, "we" must all face the fact that compensation levels sought by right holders for IPR infringement may not be available as local businesses struggle through the economic crisis. Therefore, she suggested, the better approach would be to avoid issuing an injunction, and instead allow the infringing enterprise to continue its operations so that it might pay the damages in the future. Quoting a Chinese idiom, she said "you should not drain the pond to catch the fish," elaborating that closing down a business and causing jobs to be lost is not the best solution in cases of infringement. Judge Yu therefore was making a subtle distinction: the court would not refrain from issuing an injunction expressly to save a domestic enterprise from collapse. The court would, however, do so in order to preserve the company so that it could eventually fulfill its obligations to pay damages to right holders.

Local Enforcement Increasingly Difficult

¶5. (SBU) In a March 31 meeting at China's Ministry of Commerce (MOFCOM), visiting USG officials also inquired about reports of economic downturn-induced weakening of local-level IPR enforcement. Department of Treaty & Law Deputy Director General (DDG) Li Ling replied that Chinese officials are

aware of an emerging problem of what she called local protectionism. Especially during the economic crisis, she said, local officials are feeling greater pressure to promote exports and increase domestic demand, resulting in greater than normal complexities in enforcing IPR. Li assured the group, however, that "the central government's position [on protecting IPR] will never change," and stressed that IPR protection "is a long journey with hard work," adding that her ministry looked forward to future cooperation with the United States on the issue.

U.S. Business Confirms Weaker Enforcement

¶6. (SBU) Apple Inc., the California-based designer of Mac computers, iPods, and the iPhone, is facing increasingly widespread counterfeiting in China as its products gain in worldwide popularity (see Ref B). The company hired a veteran security team

BEIJING 00001014 003.2 OF 004

accustomed to working with Chinese IP officials to begin making inroads to protect the company's rights in China. However, the company told Econoff on March 27 of recent signs that Chinese officials are less inclined to take action against counterfeiters, both by referring fewer cases for criminal prosecution and by applying lower, non-deterrent administrative penalties.

¶7. (SBU) Apple's security team has historically benefited from close cooperation with China's Public Security Bureau (PSB) on criminal investigations (i.e., seizures of counterfeit products valued above China's criminal thresholds). Having prepared a thorough case file detailing the investigation of an unusually large number of laptop computers being prepared for distribution in China, Apple employees were surprised in March when the PSB refused to conduct the criminal raid because the raid threatened as many as 100 local jobs. The PSB recommended that administrative action be taken instead; however, by the time the State Administration of Industry and Commerce (SAIC) raided the facility, the criminals had fled.

¶8. (SBU) Apple has also worked productively in the past with the SAIC on administrative raids. Recently, however, SAIC officials refused to raid a large electronics mall in Guangdong province because, they said, they feared the action would drive away what little business still existed in the area. China Customs, another historically good partner to the company, independently located a large shipment of counterfeit iPods at a southern Chinese port. However, the Customs agency levied a mere \$1,700 fine in the case, much lower than the 30 percent of total value that the counterfeiters should have been penalized, and not high enough to be deterrent.

IP Protection Still a Priority

¶9. (SBU) In other recent bilateral contacts with Chinese IP officials, they have averred that bilateral IPR cooperation remains a priority of the Chinese government, despite the above-noted indications that weaker IPR enforcement is a side effect of the economic downturn in China. SPC President Wang and IP Judge Kong have both made public statements in support of stricter law enforcement. In fact, the bulk of their public comments support this view, and Wang on March 10

told the National People's Congress that "the courts will improve the IPR trial mechanism, increase the number of IPR courts, and explore the new model of comprehensive IPR protection."

¶10. (SBU) However, the judges have also made statements that, particularly when left open to interpretation by lower-level courts and enforcement

BEIJING 00001014 004.2 OF 004

officials, are cause for concern. Judge Kong's December call for a "public interest test" is one example. Another, reported by China's "Legal Daily" newspaper, was Wang's February 6 meeting with local deputies in Henan province to discuss "how the people's courts can provide better judicial support and legal service" to maintaining growth. Wang "cited the impact of the financial crisis on the Chinese economy and admonished the courts to pay close attention to companies' operations, people's livelihoods, and social stability," and "stressed that Chinese courts must serve the overall situation of the country and the focus should be how to better service the nation's top priority - stable and fast growth."

Weak Enforcement Extends Beyond IPR Law

¶11. (SBU) While enforcement of IPR law may suffer in particular as China pursues domestic economic stability and promotes innovation of indigenous companies over that of foreigners, reports indicate that the broader rule of law may also be weakened. In a variety of business disputes, foreign business community contacts have reported that legal judgments have weakened in cases where there is a risk of destabilizing local companies and their employees. The Guangdong Procuratorate in January issued ten measures to help local enterprises facing economic difficulties, including a measure to postpone actions against company management committing "small crimes," such as bribes (See Ref C).

Comment

¶12. (SBU) Despite Chinese officials' reassurances of their commitment to strengthening IPR protection, the fact that even SPC President Wang identified economic growth as a priority of the court is problematic. Such public comments from central government officials may well prompt lower-level law enforcement officials to "do their part" in promoting domestic industry and protecting jobs during the economic crisis. Such statements may well be intended as a signal to guide judicial decision-making toward lessened penalties and fewer injunctions. If not, there is a danger that such guidance could be misinterpreted by overzealous local officials. Moreover, the risk also exists that such policies could become institutionalized beyond the economic crisis as an effective way to promote indigenous innovation and meet other national development goals at the expense of foreign and domestic right holders. We will continue to monitor and report on this situation. End Comment.